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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 453

**UNITED STATES TRUST COMPANY OF NEW YORK,
AS EXECUTOR U/W OF GEORGE H. BUNKER, DE
CEASED, PETITIONER,**

vs.

COMMISSIONER OF INTERNAL REVENUE

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED OCTOBER 31, 1933.

CERTIORARI GRANTED DECEMBER 5, 1933.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 453

UNITED STATES TRUST COMPANY OF NEW YORK,
AS EXECUTOR U/W OF GEORGE H. BUNKER, DE-
CEASED, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 87544

UNITED STATES TRUST COMPANY OF NEW YORK, as Executor
 u/w of George H. Bunker, Deceased, Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Petitioner: Wilder Goodwin, Esq.

For Respondent: Eugene G. Smith, Esq.

DOCKET ENTRIES

1936.

Dec. 21. Petition received and filed. Taxpayer notified.
 (Fee paid.)

Dec. 21. Copy of petition served on General Counsel.

1937.

Jan. 21. Answer filed by General Counsel.

Jan. 27. Copy of answer served on taxpayer.

June 8. Motion for Circuit hearing at New York filed by
 General Counsel. 6/14/37 granted.

Aug. 5. Stipulation of facts filed.

Aug. 6. Motion to submit case on stipulation of facts and
 briefs allowed by Rule 35, filed by the parties.

Aug. 9. Order that motion to submit be granted, with
 leave to the parties to file briefs under Rule 35
 if they desire, and proceeding to be assigned to
 Division 11 upon submission, entered.

[fol. 2] 1937.

Sept. 16. Brief filed by taxpayer. 9/16/37 copy served on
 General Counsel.

Dec. 9. Memorandum opinion rendered—Arthur J. Mel-
 lott, Division 11. Judgment will be entered for
 the respondent.

Dec. 10. Decision entered—Arthur J. Mellott, Division 11.

Dec. 23. Petition for review by U. S. Circuit Court of Ap-
 peals, 2nd Circuit, with assignments of error
 filed by taxpayer.

1938.

Jan. 7. Proof of service of petition for review filed by
 taxpayer.

Jan. 7. Praecipe filed—proof of service thereon.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Filed December 21, 1936

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency MT-ET-[fol. 3] C1-6576—14th New York, Estate of George H. Bunker, dated September 28th, 1936, and as a basis for his proceeding alleges as follows:

First. The petitioner is a corporation duly organized and existing under the laws of the State of New York having its principal place of business at No. 45 Wall Street, Borough of Manhattan, City, County and State of New York, and letters testamentary were duly issued to the petitioner as Executor of the Estate of George H. Bunker, deceased, by the Surrogate's Court of Westchester County, New York, on the 2nd day of January, 1935.

Second. The Notice of Deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on September 28th, 1936.

Third. The taxes in controversy are estates taxes accruing in the calendar year 1934 by reason of decedent's death on December 10th, 1934, and in the amount of Nine Hundred and forty-four and 31/100 (\$944.31) Dollars.

Fourth. The determination of taxes set forth in the said Notice of Deficiency is based upon the following error, viz.:

Inclusion in the gross estate of the sum of \$10,000 proceeds of United States Government Life Insurance Company (converted war risk insurance) payable to wife of decedent.

Fifth. The facts upon which petitioner relies as a basis of this proceeding are as follows:

(a) Decedent during the World War was an officer of the United States Army. As such officer a war risk insurance policy in the amount of \$10,000 was issued to him. Subsequently pursuant to statute this policy was duly converted by decedent into United States Government life insurance policy No. K 649,770 in the amount of \$10,000 payable to the wife of decedent.

(4) The amount of this policy was included in the Estates Tax Return by your petitioner, but was claimed to be non-taxable under Section 28 of the War Risk Insurance Act in effect June 25, 1918 (40 U. S. Stat. at Large, 609 as amended) which statute as far as applicable reads as follows:

"The compensation, insurance, and maintenance and support allowance payable under Parts II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Parts II, III, or IV; and shall be exempt from all taxation."

The policy in question bore upon its face the following clause:

"Section 11. Exempt from Taxation.—The proceeds of this policy are exempt from all taxation."

Wherefore, petitioner prays that this Board may hear the proceeding and vacate Nine hundred and forty-four and 31/100 (\$944.31) Dollars.

Wilder Goodwin, Counsel for Petitioner, Office and P. O. Address, 36 West 44th Street, Borough of Manhattan, New York City, N. Y.

Dated, New York, N. Y., December 18th, 1936.

[fol. 5] *Duly sworn to by Benjamin Strong. Jurat omitted in printing.*

[fol. 6] EXHIBIT "A" TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to MT-ET-C1-6576-14th New York, Estate of George H. Bunker.

Date of death: December 10, 1934.

Sep. 28, 1936.

United States Trust Company of New York, Executor, 45 Wall Street, New York, New York.

SIRS:

A deficiency of \$944.31 in the Federal estate tax liability of the above-named estate has been determined after a re-

view of the file in the case and a consideration of the protest against a deficiency proposed in a previous letter from this office. The determination of the deficiency and the action of this office on the protest are fully explained in the attached statement.

This notice of deficiency is given in accordance with the provisions of Section 308(a) of the Revenue Act of 1926 as amended by Section 501 of the Revenue Act of 1934, and a petition for a redetermination of the deficiency may be filed with the United States Board of Tax Appeals within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter. If you acquiesce in this determination and do not desire to file a petition with the United States Board of [fol. 7] Tax Appeals, you are requested to execute and forward the enclosed Form 890, waiving the restrictions on the immediate assessment and collection of the deficiency.

The submission of the waiver will expedite the closing of this case and will also benefit the estate by preventing the accumulation of interest charges, as the interest period terminates 30 days after the filing of the waiver or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

If within the 90-day period a petition has not been filed with the United States Board of Tax Appeals or the waiver, Form 890, has not been submitted, the deficiency will be thereafter assessed.

Respectfully, Guy T. Helvering, Commissioner, by
D. S. Bliss, Deputy Commissioner.

Enclosures: Statement, Waiver, Form 890.

[fol. 8] Statement Attached to Exhibit "A" to Petition

MT-ET-C1-6576-14th New York.

Estate of George H. Bunker.

Date of death—December 10, 1934.

Statement

The estate's protest is directed against the following:

Insurance	Gross Estate		
	Returned	Tentatively Determined	Determined
Item 3—U. S. Government War Risk Insurance Policy No. K648,770..	\$0.00	\$10,000.00	\$10,000.00
All other insurance the taxability of which is conceded by the es- tate	35,442.87	36,942.87	36,942.87
	35,442.87	46,942.87	46,942.87
Less: Exemption	40,000.00	40,000.00	40,000.00
	0.00	6,942.87	6,942.87

Following the ruling of the United States Board of Tax Appeals in the case of Bankers Trust Company and Hazel B. Fellner, Executors, Estate of Irving S. Fellner v. Commissioner, 33 B. T. A. No. 112, the War Risk Insurance was properly included for tax in the tentative audit. Accordingly no adjustment is made herein.

Deductions			
Executor's commis...	6,121.65	6,121.65	6,874.40
Attorneys' fees	6,805.85	6,805.55	7,883.86
Miscellaneous administration ex- penses	5,276.25	394.25	1,544.25

On the basis of the evidence of record, adjustments under deductions are deemed warranted as indicated above.

[fol. 9] Accordingly, the following computation shows the Federal estate tax liability which is hereby made final:

Gross estate	\$348,372.88
Deductions (1926 Act)	157,575.10
Net estate (1926 Act)	190,797.78
Net estate (1934 Act)	240,797.78
Gross tax (1926 Act)	\$4,223.93
Credit for estate or inheritance tax	3,379.14
Net tax (1926 Act)	844.79
Total gross taxes (1926 and 1934 Acts)	24,127.64
Gross tax (1926 Act)	4,223.93
Net additional tax	19,903.71
Net tax (1926 Act)	844.79
Total net tax	20,748.50
Returned tax	\$19,411.43
Amount assessed as deficiency pur- suant to waiver	392.76
	19,804.19
Deficiency	\$944.31

The deficiency bears interest at the rate of 6 per centum per annum from one year after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

[fol. 10] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER

The Commissioner of Internal Revenue by his attorney, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, for answer to the petition filed in this proceeding admits and denies as follows:

First and Second. Admits the allegations contained in the paragraphs of the petition numbered First and Second.

Third. Admits that the taxes in controversy are estate taxes but denies the remainder of the paragraph of the petition numbered Third.

Fourth. Denies that the determination of the deficiency is based upon errors as alleged in the paragraph of the petition numbered Fourth.

Fifth (a). Admits the allegations contained in subparagraph (a) of the paragraph of the petition numbered Fifth.

Fifth (b). Denies the allegations contained in subparagraph (b) of the paragraph of the petition numbered Fifth.

[fol. 11] Sixth. Denies generally and specifically each and every allegation of the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the appeal be denied.

Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue.

Of Counsel: Eugene G. Smith, Special Attorney, Bureau of Internal Revenue.

EGS:MFH 1/11/37.

[fol. 12] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 87544

UNITED STATES TRUST COMPANY OF NEW YORK, as Executor
n/w of George H. Bunker, Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Wilder Goodwin, Esq., for the petitioner.

Eugene G. Smith, Esq., for the respondent.

MEMORANDUM OPINION

MELLOTT:

The respondent determined a deficiency in estate tax in the amount of \$944.31. The sole issue is whether the proceeds of life insurance issued by the Bureau of War Risk Insurance and payable to the widow of the decedent, should be included in the gross estate of the decedent, a World War veteran, under the provisions of section 302(g) of the Revenue Act of 1926.

The decedent, George H. Bunker, died December 10, 1934. At the time of his death he had a life insurance policy issued under and subject to the provisions of the War Risk Insurance Act and amendments and supplements thereto. The designated beneficiary was the decedent's widow. In determining the deficiency the respondent included in decedent's gross estate the proceeds of this insurance amounting to \$10,000. As a result of the inclusion [fol. 13] of this amount in the gross estate, the total life insurance of decedent exceeded the statutory exemption of \$40,000 by the amount of \$6,942.87. The deficiency here in dispute is the tax upon the said amount of \$6,942.87.

The applicable statutory provision is section 302(g) of the Revenue Act of 1926. It provides for the inclusion in the gross estate of the decedent of the amount in excess of \$40,000 receivable by beneficiaries as insurance under policies taken out by the decedent upon his own life.

Petitioner contends that section 302(g), *supra* does not apply to the proceeds of decedent's War Risk Insurance on the ground that they are exempt from the Federal estate tax under the provisions of the War Risk Insurance Act, as amended, and the World War Veterans Act of 1924. These

acts, or amendments thereto, provide that the proceeds of War Risk Insurance shall be exempt from all taxation. 40 Stat. 609, section 28, 1918; 43 Stat. 613, section 22, 1924; 49 Stat. 609, section 3, 1935.

In *Bankers Trust Co. et al., Executors*, 33 B. T. A. 746, this Board considered the identical question raised by petitioner in the instant proceeding, and decided that the proceeds of life insurance issued by the Bureau of War Risk Insurance (now known as the Veterans' Administration) constituted a part of the decedent's gross estate for estate tax purposes, even though the World War Veterans Act of 1924, as amended, provided that the insurance paid to a beneficiary of a War Risk Insurance policy was exempt from taxation. To here repeat or attempt to enlarge upon the discussion and reasoning of that decision would serve no useful purpose. It is controlling of the instant proceeding, [fol. 14] and, in our opinion, effectively answers the contentions of petitioner, with one exception which will hereinafter be considered.

Petitioner contends that to tax the proceeds of War Risk Insurance violates the constitutional rights of the beneficiary under the Fifth Amendment to the Constitution of the United States. Petitioner argues that a contract between an individual and the Federal Government is property and under the Fifth Amendment may not be altered or changed without either the consent of the individual or the payment of adequate compensation; that this rule applies to a breach or modification of such a contract by the United States; that the War Risk Insurance policies are contracts of the United States, citing *Lynch v. United States*, 292 U. S. 571; that one of the terms of such contracts is that they should be exempt from all taxation; that the inclusion of the proceeds of War Risk Insurance in the gross estate of the decedent for the purpose of determining the Federal estate tax is a direct tax on such proceeds; and that such a tax deprived the beneficiary of her constitutional rights. If petitioner were correct in saying that the inclusion of the proceeds of the War Risk Insurance in the gross estate of the decedent constituted a direct tax on such proceeds there might be some merit to its argument. But the Federal estate tax is not a direct tax. It is an excise upon the privilege of transmitting property of a decedent upon his death, the amount of the tax being measured by the value of the property transmitted. Such a tax does not deprive the bene-

fiary of her constitutional rights under the Fifth Amend-
[fol. 15] ment. Chase National Bank et al. v. United States,
278 U. S. 327; New York Trust Co. v. Eisner, 256 U. S. 346;
and Knowlton v. Moore, 178 U. S. 41.

It is our conclusion that respondent did not err in includ-
ing in the gross estate of the decedent the proceeds of the
War Risk Insurance amounting to \$10,000.

Judgment will be entered for the respondent.

Enter: — — —

Entered Dec. 9, 1937.

BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 87544

UNITED STATES TRUST COMPANY OF NEW YORK, as Executor
u/w of George H. Bunker, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

Pursuant to the determination of the Board, as set forth
in its Memorandum Opinion, entered December 9, 1937, it is
[fol. 16] Ordered and decided: That there is a deficiency
in estate tax of \$944.31.

Enter.

(Signed) Arthur J. Mellott, Member. (Seal.)

Entered Dec. 10, 1937.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION FOR REVIEW—Filed December 23, 1937

The United States Trust Company of New York, as Ex-
ecutor of George H. Bunker, deceased, the petitioner in this
cause, by Wilder Goodwin, counsel, hereby files its petition
for a review by the Circuit Court of Appeals for the Second
Circuit of the decision by the United States Board of Tax

Appeals rendered on December 10th, 1937, -- B. T. A. --, determining a deficiency in the petitioner's federal estate [fol. 17] tax for the estate of the said George H. Bunker, deceased, in the amount of \$944.31, and respectfully shows:

I

The petitioner, United States Trust Company of New York, a banking corporation organized and existing under the laws of the State of New York, with its principal place of business at No. 45 Wall Street, Borough of Manhattan, City, County and State of New York, was duly appointed executor of George H. Bunker, who died a resident of Yonkers, New York, on December 10, 1934, by Letters Testamentary issued to said petitioner by the Surrogate's Court of Westchester County, New York, on January 2, 1935. The petitioner's federal estate tax return for the estate of the said decedent was made on May 24, 1935, to the office of the Collector of Internal Revenue for the Fourteenth New York Collection District.

II

Nature of the Controversy

The controversy involves the determination of the petitioner's liability as such executor of George H. Bunker, deceased, for the federal estate tax on the said estate.

George H. Bunker, the decedent herein, while serving during the World War, took out policy No. K-649,770 of United States Government life insurance in the amount of \$10,000. This insurance policy was issued under and subject to the provisions of the War Risk Insurance Act and amendments and supplements thereto. At the time of decedent's death the said policy was payable to the widow of decedent.

[fol. 18] Petitioner did not include this amount of \$10,000 as gross taxable income in the federal estate tax return filed in the estate herein as hereinabove set forth. The Commissioner of Internal Revenue, however, determined that pursuant to Section 302(g) of the Revenue Act of 1926 the \$10,000 proceeds of the said War Risk Insurance policy should be included in the gross estate of said decedent. The inclusion of the proceeds of the said policy in such gross estate caused the total life insurance of decedent to exceed the statutory exemption of \$40,000 by the amount of

\$6,942.87. The Commissioner of Internal Revenue consequently determined a deficiency in said federal estate tax of George H. Bunker of \$944.31.

The United States Board of Tax Appeals, in its said decision rendered December 10th, 1937, acquiesced in the inclusion by the Commissioner of Internal Revenue of the proceeds of the said War Risk Insurance policy in decedent's said gross estate and decided, confirming the determination of said Commissioner, that there was a deficiency in estate tax of \$944.31.

III

The said petitioner, United States Trust Company of New York, as executor of George H. Bunker, deceased, being aggrieved by the conclusions of law contained in the said opinion of the Board subjecting it as such executor to a tax on the proceeds of the said War Risk Insurance policy as hereinabove set forth and by its decision entered pursuant thereto, desires to obtain a review thereof by the Circuit Court of Appeals for the Second Circuit.

[fol. 19] Wherefore, it petitions that a Transcript of Record be prepared in accordance with the rules of the United States Circuit Court of Appeals for the Second Circuit, and transmitted to the Clerk of said Court for filing and appropriate action, to the end that the errors complained of may be reviewed and corrected by the United States Circuit Court for the Second Circuit.

IV

Assignment of Errors

Petitioner assigns as error the following acts and omissions of the Board of Tax Appeals:

1. The holding that proceeds of Government War Risk Insurance, payable to the widow of decedent, are properly included in gross estate of such decedent for the purpose of fixing the federal estate tax on the estate of said decedent.
2. The failure to determine that the taxation of War Risk Insurance violates the constitutional rights of the beneficiary of such a policy under the Fifth Amendment to the Federal Constitution.

3. The finding of a deficiency of \$944.31 in the federal estate tax on the estate of said decedent as paid by petitioner as executor of said decedent.

Wilder Goodwin, Counsel for Petitioner, 36 West 44th Street, New York, N. Y.

Dated, New York, N. Y., December 22nd, 1937.

[fol. 20] *Duly sworn to by Wilder Goodwin. Jurat omitted in printing.*

[fol. 21] BEFORE UNITED STATES BOARD OF TAX APPEALS:

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed January 7, 1938

To the Honorable the General Counsel, Washington, D. C.:

Please take notice that the petitioner on the 23rd day of December, 1937, filed with the Clerk of the United States Board of Tax Appeals at Washington, D. C., the foregoing petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the Board heretofore rendered in the above-entitled cause and the assignments of error therein contained.

Dated this 3rd day of January, 1938.

Wilder Goodwin, Counsel for Petitioner, 36 West 44th Street, New York, N. Y.

Personal service of the foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein is hereby acknowledged this 7th day of January, 1938.

(S.) J. P. Wenchel, Counsel for Respondent.

[fol. 22] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

STIPULATION AS TO FACTS—Filed August 5, 1937

It is hereby stipulated between the parties hereto as follows:

1. That decedent died on December 10th, 1934.

2. That the amount of the deficiency assessment in controversy herein is the sum of Nine hundred and forty-four and 31/100 (\$944.31) Dollars.

3. That the Treasury Department in its deficiency assessment included in the gross estate of decedent as taxable the proceeds of United States government life insurance policy No. K-649,770 in the amount of Ten thousand (\$10,000) Dollars, payable to the widow of decedent.

4. That the said insurance policy was issued under and subject to the provisions of the War Risk Insurance Act and amendments and supplements thereto.

5. That by reason of such inclusion of the proceeds of the policy in the gross estate the total life insurance of decedent [fol. 23] exceeded the statutory exemption of Forty thousand (\$40,000) Dollars by the amount of Six thousand nine hundred and forty-two and 87/100 (\$6,942.87) Dollars.

6. That the deficiency herein appealed from is the tax upon said sum of Six thousand nine hundred and forty-two and 87/100 (\$6,942.87) Dollars.

Wilder Goodwin, Attorney for Petitioner. Morrison Shafroth, Attorney for Bureau of Internal Revenue.

Dated, New York, N. Y., June 16th, 1937.

[fol. 24] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT

[Title omitted]

PRAECIPE FOR RECORD—Filed January 7, 1938

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies, duly certified as correct as required by law and the rules of said Court, of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by United States

Trust Company of New York, as Executor u/w George H. Bunker, Petitioner on Review, to wit:

1. Docket entries of the proceedings before the Board.
[fol. 25]
2. Pleadings before the Board,
 - (a) Petition, including annexed copy of deficiency letter;
 - (b) Answer.
3. Opinion and decision of the Board.
4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
5. Stipulation agreeing to the statement of facts.
6. This praecipe.

Wilder Goodwin, Attorney for Taxpayer, 36 West 44th Street, New York, N. Y. J. P. Wenchel, Attorney for Respondent.

Dated, New York, N. Y., January 3rd, 1938.

Service of a copy of the within Praecipe is hereby admitted.

Dated, January 7, 1938.

(S.) J. P. Wenchel, Attorney for Respondent.

[fol. 26] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 27] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT, OCTOBER TERM, 1937

Argued May 12, 1938. Decided July 25, 1938

No. 235

UNITED STATES TRUST COMPANY OF NEW YORK, as Executor
u/w of George H. Bunker, Deceased, Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from Board of Tax Appeals

Before Manton, Swan, and Chase, Circuit Judges

Petition to review a decision of the Board of Tax Appeals
redetermining a deficiency in Federal estate taxes. Affirmed.

Wilder Goodwin, of New York City (Robert C. Flack, of
New York City, of counsel), for taxpayer.

Abraham J. Rosenblum, of New York City, amicus curiae
for American Legion.

Edward A. Vosseler, of New York City, amicus curiae for
American Legion, Department of New York.

James W. Morris, Asst. Atty. Gen., and Sewall Key and
Berryman Green, Sp. Assts. to Atty. Gen., for respondent.

CHASE, Circuit Judge:

The sole question at issue is whether the proceeds of a
War Risk Insurance policy are includable in the gross estate
of the insured for the purpose of computing the estate
tax. They are made so includable by the broad language
of Sec. 302(g) of the Revenue Act of 1926 (40 Stat. 70), 26
U. S. C. A. § 411(g), which is in accord with similar provisions
in prior acts. Sec. 402 (f) of the Revenue Act of 1918
and that of 1921, 40 Stat. 1098, 42 Stat. 279, and Sec. 302(g)
of the Revenue Act of 1924, 26 U. S. C. A. § 411 note. The
Commissioner has always construed these sections as he
did the one here involved to make the proceeds of War Risk
Insurance includable in the decedent's gross estate for the

determination of the estate tax. Reg. 37; Art. 32; Reg. 63; Art. 63; Reg. 68; Art. 25. Congress has re-enacted the statute without material change in that respect and thereby given such evidence of its approval of the administrative construction that we are persuaded that the statute does, in so far as it can, provide for the inclusion. The Board, relying mainly upon its previous decision in *Bankers Trust Co. et. al., Executors, v. Commissioner*, 33 B. T. A. 746, upheld the Commissioner and the executor has brought this petition for review.

The insured was George H. Bunker, a veteran who died December 10, 1934. At the time of his death he held a valid policy of War Risk Insurance in the amount of \$10,000 in which his wife was named as the beneficiary. The proceeds of that policy were duly paid to his widow. The deficiency in question was determined by the Commissioner by including that \$10,000 in the gross estate of the decedent and finding that when so included such gross estate exceeded the statutory exemption of \$40,000 by \$6,842.87. The tax computed upon such excess is the one here involved.

As it is plain enough that Congress has attempted to include the proceeds of this insurance in the gross estate of an insured for computing the amount of the estate tax, it remains to be determined whether it had the power to do so. The petitioner says it did not for two reasons. The first is that by the express provisions of Sec. 28 of the War Risk Insurance Act, 40 Stat. 609, insurance payable on such a policy is exempted from taxation; and the second is that the policy was a contract of the United States which created a vested property right and that its taxation would be a [fol. 28] deprivation in violation of the Fifth Amendment, U. S. C. A. Const. Amend. 5. We need not disagree with either premise to reach, as we do, a conclusion contrary to that of the petitioner and in accord with that of the Board of Tax Appeals since neither the policy nor its proceeds have been taxed.

The estate tax is an excise tax upon the right to transfer property upon death. *Chase National Bank v. United States*, 278 U. S. 327, 49 S. Ct. 126, 73 L. Ed. 405, 63 A. L. R. 388. It is a tax upon the privilege and not upon the property itself. Consequently there is no conflict between the exemption statute and the estate tax statute and no need

to consider whether the latter has in any way modified the former. A close analogy may be found in the gift tax. See *Bromley v. McCaughn*, 280 U. S. 124, 50 S. Ct. 46, 74 L. Ed. 226; *Burnet v. Guggenheim*, 288 U. S. 280, 53 S. Ct. 369, 77 L. Ed. 748. And the controlling principle has already been established in respect to estate taxes measured by including tax exempt bonds in the amount upon which the tax is computed. *Plummer v. Coler*, 178 U. S. 115, 20 S. Ct. 829, 44 L. Ed. 998, and *Murdock v. Ward*, 178 U. S. 139, 20 S. Ct. 775, 44 L. Ed. 1009. These cases cannot be distinguished on the theory that here some special kind of property was transmitted which in some way makes this a tax on property for "it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested." *Knowlton v. Moore*, 178 U. S. 41, 56, 20 S. Ct. 747, 753, 44 L. Ed. 969. Further emphasis upon the distinction between a tax upon the property and one upon the privilege of transferring such property may be found in *Hamersley v. United States*, Ct. Cl., 16 F. Supp. 768, and *Phipps v. Commissioner*, 10 Cir., 91 F. 2d 627, 112 A. L. R. 1441.

As to the second ground relied on by the petitioner there is little left to be said. Since the proceeds of the policy have not themselves been taxed it cannot be said that anyone has been deprived of a vested contract right. See *Chase National Bank v. United States*, *supra*. Indeed, so far as the contract itself is concerned performance was completed when the proceeds of the policy were paid in full to the widow.

Affirmed.

[foi. 29] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND
CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 10th day of August, one thousand nine hundred and thirty eight.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

UNITED STATES TRUST COMPANY OF NEW YORK, as Exr.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 30]: [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States Trust Company of New York vs. Commissioner of Internal Revenue. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 10, 1938. William Parkin, Clerk.

[fol. 31] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 30, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States Trust Company of New York, as Exr., Petitioner, against Commissioner of Internal Revenue, Respondent, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this ninth day of September, in the year of our Lord one thousand nine hundred and thirty-eight, and of the Independence of the said United States the one hundred and sixty-third.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 32] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 5, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Wilder Goodwin. File No. 42,938. U. S. Circuit Court of Appeals, Second Circuit. Term No. 453. United States Trust Company of New York, as Executor u/w of George H. Bunker, deceased, petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed October 31, 1938. Term No. 453, O. T., 1938.

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